

No. 77-1035

Supreme Court, U. S.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

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**CODA LLOYD VICE, JR., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals is reported at 562 F. 2d 1004.

**JURISDICTION**

The judgment of the court of appeals was entered on November 11, 1977. A petition for rehearing was denied on December 22, 1977. The petition for a writ of certiorari was filed on January 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(c); the correct section is 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether a person may be convicted of making a false statement in connection with the acquisition of a firearm when he falsely denies at the time of acquisition

(1)

that he has been convicted of a felony, but the outstanding state felony conviction is subsequently set aside on the ground that the state indictment charged a misdemeanor.

2. Whether petitioner received an excessive sentence.

STATEMENT

After entering a plea of *nolo contendere*, petitioner was convicted in the United States District Court for the Southern District of Mississippi of one count of making a false written statement in the acquisition of a firearm, in violation of 18 U.S.C. (1970 ed.) 922(a)(6). He was sentenced to a term of three years' imprisonment and fined \$2,500. The court of appeals affirmed (Pet. App. 1a-3a).

On December 1, 1975, petitioner purchased a revolver from a licensed firearms dealer in Pascagoula, Mississippi. During the transaction, petitioner signed the required Treasury Department form,<sup>1</sup> in which he certified that he had not been convicted of a crime punishable by a term of imprisonment exceeding one year. In May 1966, however, petitioner had pleaded guilty in Jackson County, Mississippi, to a charge of willfully and feloniously bombing a tractor and was sentenced to five years in the state penitentiary, which was suspended in favor of probation (Tr. 31-33). The sentence recited that petitioner had pleaded guilty to the crime of "Unlawful Use of Explosives."<sup>1</sup>

<sup>1</sup>Section 97-37-25 of the Criminal Laws of Mississippi (1972), "Explosives-unlawful use," prohibits the planting of bombs in any building or vehicle where goods are being stored or where persons are located or being transported. This statute provides a penalty of imprisonment for any term as the court, in its discretion, may determine, or for punishment of death if such a penalty is fixed by the jury.

After the instant indictment (charging petitioner with making a false statement in the acquisition of a firearm) was returned on January 11, 1977, and before trial was scheduled to commence, petitioner filed a petition to vacate the state court judgment in the circuit court of Jackson County, Mississippi. On March 17, 1977, the state circuit court sustained the motion, finding that the original indictment charged only the misdemeanor of malicious mischief<sup>2</sup> and that defendant had pleaded guilty only to a misdemeanor. The court vacated the felony judgment and changed the sentence to six months in the county jail, reducing the sentence to the time previously served on probation.

Thereafter, pursuant to an agreement with the government, petitioner entered a plea of *nolo contendere* in the present case in return for dismissal of two other counts (Tr. 50).<sup>3</sup> The court accepted the plea, finding that a factual basis for the plea existed and that the plea was knowingly and voluntarily made.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that he could not be convicted for falsely denying the existence of a prior state felony conviction in connection with the acquisition of a firearm because the felony conviction was later vacated

<sup>2</sup>Section 97-17-67 of the Criminal Laws of Mississippi (1972) proscribes the crime of malicious mischief. The penalty for this offense is a fine of double the value of the property destroyed or damaged, or imprisonment in the county jail for a period not exceeding twelve months.

<sup>3</sup>The other two counts charged petitioner with other offenses arising out of the acquisition of the same firearm.



before his trial on the federal charge.<sup>4</sup> As the court of appeals correctly concluded (Pet. App. 2a), however, the fact that the prior conviction was subsequently set aside "does not obviate the requirement imposed by §922(a)(6) 'to tell the truth about the conviction.' "

The statute under which petitioner was convicted, 18 U.S.C. (1970 ed.) 922(a)(6), makes it unlawful for any person "knowingly to make any false or fictitious oral or written statement" in connection with the acquisition of a firearm. The statute was passed as part of the Gun Control Act of 1968, comprehensive legislation designed to cut back the possession of firearms by unreliable persons. As reflected in its legislative history, carefully reviewed in *United States v. Graves*, 554 F. 2d 65 (C.A. 3) (*en banc*), this provision "places an obligation on all prospective gun purchasers to provide full and honest information, and bars false statements in firearms transactions" (*id.* at 75). Examining the statute and legislative history, the Sixth Circuit has concluded (*Cassity v. United States*, 521 F. 2d 1320, 1323):

We are unable to believe that Congress intended that a prospective purchaser of a firearm under this section is entitled to conceal the fact of a prior conviction, even if a claim of constitutional invalidity is subsequently established. Nor can we believe that

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<sup>4</sup>There is no question that the statement was false when it was made. Petitioner's previous conviction resulted in a suspended sentence of imprisonment for five years in the penitentiary. His sentence recited that he had pleaded guilty to the crime of unlawful use of explosives. This is a felony under Section 97-37-25 of the Criminal Laws of Mississippi and the indictment charged that he had feloniously bombed a tractor.

any person filling out the requisite form would conclude that he was not required to make disclosure under such circumstances.

See also *United States v. Ransom*, 545 F. 2d 481 (C.A. 5), certiorari denied, October 17, 1977 (No. 76-6261).

Although his prior felony conviction was later set aside, that does not relieve petitioner from the consequences of previously making a false statement denying it. The fact of an earlier conviction, like the fact of an indictment, has a rational bearing on the fitness of a person to possess a gun, at least until the conviction is set aside. Given the serious problem of controlling crimes committed with firearms, and given the relatively modest nature of the regulatory intrusion on individual prerogatives, it is surely reasonable of Congress to require the fact of an earlier conviction to be disclosed before a firearms transaction is completed. If the prior conviction is for some reason believed to be defective, inquiry can be made or action taken to determine whether it should properly bar the applicant's acquisition and possession of a firearm. By falsely denying the fact of the prior conviction, however, petitioner improperly arrogated to himself the function of assessing his qualification to acquire the firearm. In sum, having neither sought nor obtained relief from his conviction at the time of a false statement, a purchaser may not choose simply to treat the conviction as if it did not exist and misrepresent his criminal record in his efforts to obtain a firearm.

We note that the Ninth Circuit has held, relying on *Burgett v. Texas*, 389 U.S. 109, and similar cases, that a defendant cannot be convicted under Section 922(a)(6) for denying the existence of a prior felony conviction when he was not represented by counsel during the earlier proceedings. See *United States v. O'Neal*, 545 F. 2d 85;

*United States v. Pricepaul*, 540 F. 2d 417. It is undisputed, however, that petitioner in this case was represented by counsel when he pleaded guilty to the felonious bombing charge. While petitioner now contends that such counsel provided ineffective assistance, an issue not raised below and thus not properly before this Court (see *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2), no court has held that such a claim constitutes a defense to a Section 922(a)(6) charge.<sup>5</sup> Nor has any court provided relief because it was later determined that the earlier indictment failed to set forth sufficient facts to establish a felony. Thus, we do not believe that there is a genuine conflict in the circuits on the issue raised in this petition.<sup>6</sup>

2. Petitioner also contends (13-15) that his sentence was excessive. It is well settled, however, that an appellate court generally will not disturb a sentence within the range provided by statute. See *Gore v. United States*, 357 U.S. 386; *Dorszynski v. United States*, 418 U.S. 424, 440-441. In this case, where petitioner received a term of three

<sup>5</sup>We note that the state court did not invalidate petitioner's earlier conviction on this ground. Indeed, despite later events, it may be argued that counsel did not render ineffective assistance by failing to argue that petitioner endangered no persons, since the Mississippi Supreme Court has held that danger to persons is not an essential element of the crime. See *Tarrants v. State*, 236 So. 2d 360, 365-366, citing *Rogers v. State*, 89 So. 2d 860, 861-863.

<sup>6</sup>The decision below is not in conflict with *United States v. Fryer*, 545 F. 2d 11 (C.A. 6), on which petitioner relies (Pet. 9-11). In *Fryer* the court of appeals noted (545 F. 2d at 13) that the defendant's earlier conviction had been automatically vacated by operation of law prior to his purchase of a firearm. In the present case, it was never contemplated at the time of petitioner's earlier conviction that it would subsequently be voided upon satisfaction of certain conditions, and no such automatic vacation had occurred. Thus, although we disagree with the result in *Fryer*, it presents a different case from the one at issue here.

years' imprisonment out of a possible five years and was fined only one-half of the maximum five thousand dollar fine, 18 U.S.C. 924(a), there are no exceptional circumstances that support a departure from this rule. Rather, the pre-sentence report showed that petitioner was a repeated offender, possessing at that time 25 convictions for misdemeanors, including assault and battery charges (Probation Report at 3-4).<sup>7</sup>

#### CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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<sup>7</sup>Even petitioner's own counsel admitted that the Probation Report was "adverse" to petitioner (Tr. 47). In fact, petitioner's state probation officer had twice petitioned the state court to revoke probation because of petitioner's violent activities (Probation Report at 2).